77

(2)

No. 07-470

FILED
DEC 7 - 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

IN THE

Supreme Court of the United States

TOM ROBINSON and
ROBERT TYGARD,

Petitioners,

v.

CANDACE LEHMAN, Administrator
of the Estate of Joshua Lehman,

Respondent.

ON PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF IN OPPOSITION

JEFFREY A. DICKERSON
9655 Gateway Drive
Suite B
Reno, NV 89521
(775) 786-6664

Attorney for Respondent

212861

COUNSEL PRESS
(800) 274-3321 • (800) 359-6859

QUESTIONS PRESENTED

1. Whether a violation of the Fourth Amendment is stated where, construing the evidence most favorably to Respondent and/or as viewed on the videotape, Petitioners shot and killed Respondent's decedent where decedent was fully contained by vehicles and armed officers and posed no immediate danger to officers or others in the area.

2. Whether Fourth Amendment law at the time was clearly established such that a reasonable officer in Petitioners' position would have known his conduct was unconstitutional.

SUMMARY OF ARGUMENT

The asserted bases for error are that the Ninth Circuit opinion below is at odds with opinions of this Court and of other Circuits on "this Fourth Amendment issue" and that the Ninth Circuit ignored this Court's precedent regarding the importance of a videotape to the qualified immunity analysis. Petitioners' argument that the videotape proves no constitutional violation is nothing more than an assertion that judges below misapplied the law, and ignores that the judges below all viewed the videotape. This case presents issues considered by this Court recently. No new or additional guidance is needed. Thus, no important precedent will be established herein. The decision below does not present a case by which a supposed conflict among the Circuits can be addressed. Lastly, Petitioners' issues are not framed to match the issues presented in a qualified immunity analysis.

REASONS FOR DENYING THE PETITION

"This Fourth Amendment issue" has been canvassed by this Court most recently in *Scott v. Harris*, __ U.S. __, 127 S. Ct. 1769 (2007); *see also Brosseau v. Haugen*, 543 U.S. 194 (2004). Therefore, this case does not present an important or novel basis for clarification or extension of those holdings.

The fact that this single opinion may be at odds on its facts with other decisions does not support the proposition that there is conflict between the Circuits to the degree that an important federal question is presented. Qualified immunity turns on the specific facts of each case, but this does not render the law unclear for qualified immunity

purposes. *Saucier v. Katz*, 533 U.S. 194 (2001); *see also Anderson v. Creighton*, 483 U.S. 635, 640 (1987). Novel circumstances do not render the law unclear as long as the reasoning of prior caselaw puts the officer on notice. *Hope v. Pelzer*, 536 U.S. 730, 743 (2002).

Petitioners contend the careful analysis of the district court (Appendix C, 43a-46a), and the more expanded analysis of the Ninth Circuit (Appendix A, 5a-7a), on the second prong of the *Saucier v. Katz*, *supra*, test violates *stare decisis* as to *Haugen*, *supra*. Distinguishing *Haugen*, even if done incorrectly, is merely a "misapplication of a properly stated rule of law", an error expressly excluded from the ambit of Supreme Court Rule 10. "A petition for a writ of certiorari is rarely granted when the asserted error consists of the misapplication of a properly stated rule of law." *Id.*

The argument that the Court below misapplied the law as to the videotape does not rise to an important federal question worthy of certiorari to the Ninth Circuit. If true, it too is but a "misapplication of a properly stated rule of law", generally disqualified from certiorari by Rule 10. The district court and the Ninth Circuit panel reviewed the videotape, which was part of the record. Thus, four separate jurists below have reviewed it and reached the same conclusion, thus actually following *Scott v. Harris*, *supra*.

In short, none of the considerations under Rule 10 are present. The present petition does not present the rare case for certiorari described in Rule 10. Therefore, the petition should be denied.

Pursuant to Supreme Court Rule 15(2), the brief in support of the petition incorrectly sets forth the facts. The facts are not stated in a light most favorable to Respondent, as required under the qualified immunity analysis. *Saucier*, *supra* at 201. A correct statement of the facts in this regard is stated by both the district court and the Ninth Circuit.

Pursuant to Supreme Court Rule 15(2), the Petition is erroneous because as phrased the "Questions Presented" misstate and/or over-state the issues. The first issue should read "Whether a constitutional violation is established, construing the evidence in a light most favorable to Respondent where ...." *Saucier*, *supra*. The first "Question Presented" is not phrased in this manner. The second "Question Presented" should be, "Whether the law concerning deadly force in a fully contained roadside standoff was clearly established at the time." *Id.* The second "Question Presented" asserts that the law to be "clearly established" is law that holds the Fourth Amendment is violated "when an officer uses deadly force to protect innocent persons from the risk of dangerous vehicular flight by a felony suspect." This phraseology is misleading because it dodges the alleged violation found considering the evidence in a light most favorable to Respondent. The phraseology is also misleading because it re-characterizes the holdings below in *reductio absurdum* fashion. Neither the Ninth Circuit nor the district court found this to be the applicable clearly established law. Appendix A, 5a-7a; Appendix C, 43a-46a. Construing the evidence in a light most favorable to Respondent, this case does not present a situation where the officers' interest was "to protect innocent persons from the risk of dangerous vehicular flight by a felony suspect." The issues are improperly phrased and do not comport with the evidence in this case or with the law as correctly applied below.

CONCLUSION

For these reasons, the Petition should be denied.

Respectfully submitted,

JEFFREY A. DICKERSON
9655 Gateway Drive
Suite B
Reno, NV 89521

Attorney for Respondent